19-407

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1249~~ 827

THE UNITED STATES, PLAINTIFF,

vs.

WILLIAM RAUSCHER.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 15, 1886.

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1 Circuit court of the United States of America for the southern district of New York, in the second circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of January, in the year of our Lord one thousand eight hundred and eighty-five, and continued by adjournment to and including the tenth day of March, in the year of our Lord one thousand eight hundred and eighty-five.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that William Rauscher, late of the city and county of New York, in the district and circuit aforesaid, mariner, heretofore, to wit, on the ninth day of October, in the year of our Lord one thousand eight hundred and eighty-four, being on the high seas, out of the jurisdiction of any particular State of the said United States of America, on waters within the admiralty and maritime
2 jurisdiction of the said United States of America, in and on board of a certain American vessel, being a ship called I. F. Chapman, of which said vessel he, the said William Rauscher, was then and there an officer, to wit, second mate, upon one Janssen, whose first name is to the jurors aforesaid as yet unknown, the said Janssen being then and there one of the crew of the said vessel, unlawfully did make an assault, and from malice, hatred, and revenge, and without justifiable cause, did unlawfully inflict upon him, the said Janssen, cruel and unusual punishment, then and there against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

3 SECOND COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that William Rauscher, late of the city and county of New York, in the district and circuit aforesaid, mariner, heretofore, to wit, on the ninth day of October, in the year of our Lord one thousand eight hundred and eighty-four, being on the high seas, out of the jurisdiction of any particular State of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States of America, in and on board of a certain American vessel, being a ship called I. F. Chapman, of which said vessel he, the said William Raucher, was then and there an officer, to wit, second mate, upon one Janssen, whose first name is to the
4 jurors aforesaid as yet unknown, the said Janssen being then and there one of the crew of the said vessel, unlawfully did make an assault, and from malice, hatred, and revenge, and without justifiable cause, did unlawfully beat and wound the said Janssen, then and there against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

ELIHU ROOT,
U. S. Attorney.

5 (Indorsed:) U. S. circuit court. The United States of America

vs. William Rauscher. Indictment, cruel and unusual punishment. U. S. Rev. St. § 5347. Elihu Root, U. S. district attorney. A true bill. Edgar M. Smith, foreman. U. S. circuit court. Filed Mar. 10, 1885. Timothy Griffith, clerk. Mch. 11, 1885, the defendant arranged and indict. read. Def't plead not guilty. Ap'l 13th & 14th, 1885, the defendant tried. Verdict, guilty.

6 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York on the third Monday of October, in the year of our Lord one thousand eight hundred and eighty-five.

Present, the honorable William J. Wallace, the honorable Charles L. Benedict, judges.

THE UNITED STATES
against
WILLIAM RAUSCHER.

7 This cause coming on to be heard at this term, before judgment upon the verdict, on a motion in arrest of judgment, and also on a motion for a new trial before the two judges above mentioned, at such hearing the following questions occurred:

First. The prisoner having been extradited upon a charge of murder on the high seas of one Janssen, under section 5339 U. S. R. S., had the circuit court of the southern district of New York jurisdiction to put him to trial upon an indictment under section 5347 U. S. R. S., charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an officer, and such punishment consisting of the identical acts proved in the extradition proceedings?

8 Second. Did or not the prisoner under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the indictment, without being first afforded an opportunity to return to Great Britain?

Third. Was it error on the part of the trial judge to overrule a plea to the jurisdiction of the court to try the indictment under section 5347 of the United States Revised Statutes, charging the accused with cruel and unusual punishment of one Janssen, one of the crew of a vessel of which accused was an officer, it having been established upon said plea

9 that the accused was extradited under the extradition treaty with Great Britain upon the charge of murder of the same Janssen under section 5339 of the United States Revised Statutes?

Fourth. Was it error on the part of the trial judge to refuse to direct a verdict of acquittal, after it had been proven that the accused was extradited under the extradition treaty with Great Britain, upon the charge of murder, it also appearing that in the proceedings preliminary to the warrant of extradition the same act was investigated, and the same witnesses examined as at the trial?

In respect to each of which questions the judges aforesaid were divided in opinion;

Wherefore at the same term, at the request of the United States
10 attorney, they have caused the points above stated to be certified under the seal of this court, together with a copy of the indictment and an abstract of the record, to the Supreme Court of the United States for final decision, according to law.

WM. J. WALLACE.
CHAS. L. BENEDICT.

(Endorsed:) U. S. circuit court, southern district of New York. The United States versus William Rauscher. Certificate of division. William Dorsheimer, United States attorney, attorney for plaintiff. U. S. circuit court. Filed Jan. 5th, 1886. Timothy Griffith, clerk.

11 *Cruel and unusual punishment on the high seas.*

THE UNITED STATES }
vs.
WILLIAM RAUSCHER. }

1885.
M'ch 10. Filed indictment.
" 11. Def't pleads not guilty.
Ap'l 13. Def't's trial commenced.
" 14. " " concluded; verdict, guilty.
" 16. Filed notice of motion for new trial.
" " Filed statement of facts.
Nov. 17. " order reargiuing cause at term commencing 3d Monday of Oct., 1885.
1886.
Jan'y 5. Filed certificate of division.

12 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eleven inclusive, contain a true and complete transcript of the indictment, certificate of division, and abstract of the record had in said court, in the case of the United States of America against William Rauscher, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of
13 New York, in the second circuit, this fourteenth day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the said United States the one hundred and tenth.

[SEAL.] TIMOTHY GRIFFITH,
Clerk.

(Indorsement on cover:) No. 1249. The United States, plaintiff, vs. William Rauscher. S. New York, C. C. U. S. Filed January 15, 1886.

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119-407

Office Supreme Court U.S.
FILED
FEB 26 1886
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES, PLAINTIFFS,
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} No. 1249.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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WILLIAM RAUSCHER. } No. 1249.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

Statement of the case.

On the 10th day of March, 1885, the defendant was indicted in the circuit court of the United States for the southern district of New York, for inflicting cruel and unusual punishment upon one Janssen, one of the crew of a vessel called I. F. Chapman, of which said vessel he, the said defendant, was an officer, to wit, second mate. On the 11th day of March, 1885, the defendant was arraigned, and pleaded not guilty. He was afterwards tried,

and a verdict of guilty was found against him. The cause coming on to be heard on the third Monday of October, 1885, before judgment upon the verdict, on a motion in arrest of judgment, and also on a motion for a new trial, the judges were divided in opinion upon the following questions:

First. The prisoner having been extradited upon a charge of murder on the high seas of one Janssen, under section 5339, of the United States Revised Statutes, had the circuit court of the southern district of New York jurisdiction to put him to trial upon an indictment under section 5347, of the United States Revised Statutes, charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an officer, and such punishment consisting of the identical acts proved in the extradition proceedings?

Second. Did or not the prisoner under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution from the charge set forth in the indictment without being first afforded an opportunity to return to Great Britain?

Third. Was it error on the part of the trial judge to overrule a plea to the jurisdiction of the court to try the indictment under section 5347 of the United States Revised Statutes, charging the accused with cruel and unusual punishment of one Janssen, one of the crew of a vessel of which accused was an officer, it having been established upon said plea that the accused was extradited under the extradition treaty with Great Britain upon the

charge of murder of the same Janssen under section 5339 of the United States Revised Statutes?

Fourth. Was it error on the part of the trial judge to refuse to direct a verdict of acquittal after it had been proven that the accused was extradited under the extradition treaty with Great Britain upon the charge of murder, it also appearing that in the proceedings preliminary to the warrant of extradition the same act was investigated and the same witnesses examined as at the trial?

Whereupon the points above stated were certified to this court for final decision according to law.

Argument.

The subject of the extradition of persons charged with crime in another country has been much discussed by many eminent writers upon international law. Mr. Wheaton mentions Grotius, Vattel, Kent, and others as holding—

> That, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the Government of that country within whose jurisdiction the crime has been committed.

But it must be conceded that the principle of extradition, viewed irrespective of treaty stipulations, has never been so established in the practice of nations as to entitle it to be regarded as an international law. Whatever may have been the earlier practice, nations in modern times dispose of the question by treaties, and do not recognize

any obligation to surrender fugitive criminals, except as the same is provided for in this way.

The extradition provision in the treaty of 1794, between Great Britain and the United States, was limited to the period of twelve years, and hence after 1806 it ceased to be operative, and no similar stipulation was entered into until the ratification of the treaty of 1842, commonly known as the "Ashburton" treaty. Article 10 of that treaty provides as follows:

> It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive, or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.

The question now presented by this certificate of division is whether the defendant, having been extradited upon the charge of murdering one Janssen upon the high seas, could be tried under an indictment charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an officer, and such punishment consisting of the identical acts proved in the extradition proceeding. In other words, did the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the indictment, without first being afforded an opportunity to return to Great Britain?

We submit that the doctrine contended for on the other side finds no support in the terms of the treaty itself. The extradition provision therein contained simply specifies that the two Governments will, upon due requisition, mutually *deliver up to justice* all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or be found within the territories of the other. Did the parties by the language employed intend it to be understood that after surrender the fugitive would be only liable for the crime specified in the extradition proceeding? No such understanding appears in the debates of Congress or the Parliament of Great Britain, or the correspondence which took place between the eminent men who negotiated the treaty. The language itself, so far from conferring the

immunity claimed, would seem to negative such an idea. The stipulation is that the offender shall be "*delivered up to justice*," and there is no qualification whatever. The treaty is not only a contract between the Governments of Great Britain and the United States, but, by virtue of the Constitution of the latter (article 6) it is the supreme law of the land. Looking alone, then, to the supreme law, we repeat that there is nothing in it which warrants the claim of the prisoner to immunity.

How does the matter stand upon authority? In *United States* vs. *Caldwell* (8 Blatchford, 131), it was held by Judge Benedict that the defendant, although extradited upon a charge of forgery, might be indicted and tried upon a charge of bribery. In that case the learned judge said:

> The prisoner was brought within the jurisdiction of the United States by virtue of a warrant of the executive authority of a foreign Government upon a requisition of the executive department of the Government of the United States; and while abuse of extradition proceedings, and want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two Governments, such complaints do not form a proper subject of investigation in the courts, however much those tribunals might regret that they should have been permitted to arise. To hold otherwise would, in a case like the present, permit a person accused of crime to put the Government on trial for its dealings with a foreign power.
>
> * * * * *
>
> But whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction

of the court, charged with a crime therein committed, and I am at a loss for even a plausible reason for holding upon such a plea as the present that the court is without jurisdiction to try him. The question appears to me to be not one of jurisdiction in the court, but rather of privilege from arrest, and I cannot see that the fact that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery affords him a legal exemption from prosecution for other crimes by him committed.

In the *United States* vs. *Charles L. Lawrence* (13 Blatchford 295) it was decided, first, that extradition proceedings do not by their nature secure to a person surrendered immunity from prosecution for offenses other than the one upon which the surrender was made. Second. There is no provision in the treaty between the United States and Great Britain, of August 9, 1842, which confers such immunity, nor is it conferred by the act of August 12, 1848, or by the act of March 3, 1869. Third. The British extradition act of August 9, 1870 (33 and 34 Vict., chap. 52), has no binding force on the courts of the United States in regard to the construction of the treaty of 1842. Fourth. It does not appear that the Executive Department, by authority of the United States or Great Britain, hasconstrued the treaty of 1842 as conferring such immunity.

Judge Benedict, in delivering his opinion in that case, said:

It is, however, argued, that both the parties to this treaty have placed a construction upon its provisions which confers the immunity for which the accused contends, and reference is made to the acts of Congress of August 12, 1848 (9 U. S. Stat. at Large, 302), and March 3, 1869 (15 *Id.*, 337, U. S.

Rev. Stat., secs. 5270 to 5277), and to the British extradition act of August 9, 1870 (33 and 34 Vict., chap. 52), as supporting the assertion.

The act of Congress of 1869 is a general law, intended for the protection of extradited offenders; but the protection it confers is expressly limited to cases of "lawless violence." It is true that it assumes, as well it may, that the offender will be tried for the offense upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses in a statute having no other object than the protection of extradited offenders is sufficient to deprive of all force the suggestion that the act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused.

So of the act of 1848, the provision of which relied upon (sec. 3), is, that it shall be lawful for the Secretary of State to order the offender "to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign Government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly." It does not seem reasonable to suppose that it was the intention of Congress, by the above language, to give a legislative construction to the existing treaty of 1842. The provision of the act of 1848 is within the broad provision of that treaty, but does not restrict the operation of that provision; and it may be safely assumed that if the intention to limit the effect of, or give a construction to, that or any other treaty had been entertained—assuming such a function to belong to a statute of this character—that intention would have been plainly expressed.

The acts of Congress referred to, therefore, fail to afford a legislative construction of the treaty in the particular under consideration.

It is still more difficult to find support for the doctrine of the defense in the provisions of the British extradition act of 1870. How can it be that, without any action on the part of the treaty-making power of the United States, the Parliament of Great Britain, by a statute of Great Britain passed twenty-eight years after the treaty of 1842, can ingraft upon that treaty a provision of immunity not found in the treaty, and which must hereafter be enforced by courts as part of the laws of the United States?

The effect proper to be given by the Executive Department of the Government to any condition found in an extradition statute of Great Britain, to which the Government of the United States has assented in any particular case, is not under consideration. Here the question is judicial, and it is whether the British act of 1870, by reason of its subject-matter, becomes a law of the United States, and, as such, affords a legislative construction of this treaty, binding upon the courts of the United States. Upon such a question no time need be spent, and it is dismissed with the observation that it would appear that the English courts incline to the opinion that the act of 1870 has no effect in England, even to limit the operation of the treaty of 1842, as is seen by the opinions delivered in the court of Queen's bench in *Ex parte Bouvier* (27 Law Times R., 844). The words of the Lord Chief Justice in that case are:

I see plainly what was the intention of the legislature—that is to say it was intended [by the act of 1870], while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force.

In *Adriance* vs. *Lagrave* (59 N. Y. Reports, 110), the court of appeals held that a person brought within the United States by an extradition proceeding on the charge of burglary might be arrested therein in a civil action. In that case Chief-Justice Church, in delivering the opinion of a majority of the court, said:

> These authorities indicate at least the views entertained in this country, England, and France, which are, as far as they go, against the position claimed. In none of them is there an allusion to any treaty obligation. If such a provision had been inserted in the treaty it would, of course, have secured to the defendant a legal right of immunity from detention for other purposes. A treaty is a contract, and is to be construed upon principles similar to those applied to other contracts. Anything necessarily implied is as though inserted, but can it be said that there is such an implication of an agreement, on the part of the United States, that the prisoner shall not be detained for any other lawful purpose? It may be conceded that such a provision would be wise and proper, but can it be regarded *as in the treaty?* I can find no authority warranting such a conclusion. On the contrary, the cases are quite uniform against it.
>
> The English Parliament has since passed an act to meet the difficulty (33 and 34 Vict., ch. 52). It is designated "the extradition act of 1870," and provides that a fugitive criminal shall not be delivered up unless by the law of the foreign country, or by arrangement, he cannot be tried for any but the extradited offense until he has an opportunity of returning to that country, and the same provision of immunity from prosecution is secured in favor of fugitives delivered to that country. These provisions would have been unnecessary if there existed any such

treaty obligation as is claimed in this case. While we appreciate the justice and fairness in the abstract of the principle adjudged in the court below, in view of the authorities referred to, and in the absence of any legal principle upon which it can rest, we do not feel justified in holding that there is such an implied obligation which can be enforced by the courts, at the instance of the defendant, as will prevent a prosecution for other offenses or civil liabilities.

The right of exemption from prosecution, if it can be said to exist at all, is based upon the good faith of the Government, which is necessarily uncertain, and is a political and not a judicial question. Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject of extradition is confided to the Federal Government. It has exercised this power by passing an act to protect fugitive criminals from lawless violence (15 U. S. Stat. at Large, 337, pt. 1). That these provisions ought to be extended to protection from other prosecutions or detention I do not doubt, but until this is done by the law-making power, by treaty or statute, we feel constrained to hold that the courts cannot interfere.

In the spring of 1875 Charles L. Lawrence was extradited, under the treaty of 1842 with Great Britain, upon a charge of forgery. Upon being brought back to this country he was arrested upon bench warrants issued by a United States circuit court, based on charges of other offenses committed before his surrender, and was also served with a capias, issued by the same court, in a civil suit brought by the United States to recover a debt due prior to his surrender. Whereupon he petitioned the President to instruct the proper officers not to prosecute

is bona fide tried for the offense for which he was given up there is nothing to prevent his being subsequently tried for another offense, either antecedently committed or not.

In the able correspondence between Mr. Fish and Lord Derby with reference to the extradition of Windlow (Message and Documents Department of State, 1876–'77), the view of the Executive Department of this Government, as expressed by Mr. Fish, is that, after a bona fide effort to convict a person of the charge for which he was surrendered, the receiving power may try him for any other offense. It is true that some of the publicists and writers on international law have announced a different doctrine on this subject, and that they are sustained by the decisions of some of the courts. In *Com.* vs. *Hawes* (13 Bush., 697), it was held by the Kentucky court of appeals that the defendant, who had been surrendered under the treaty of 1842 upon a charge of forgery, could not be indicted and tried for embezzlement. In *United States* vs. *Watts* (8 Sawyer, 370) Judge Hoffman, in a very able opinion, reached the same conclusion.

But after such an examination of the reported decisions as we have been able to make, we submit that the weight of authority is in favor of the proposition that the defendant in this case, having been extradited upon a charge of murder, has not acquired the right of exemption from prosecution upon the charge contained in the indictment. If, however, the court should be of a different opinion, we submit that it sufficiently appears from the record that the defendant has not been tried for any different offense than that for which he was extradited. The first clause of the certificate of division found in the record shows that the

punishment inflicted by the defendant upon the man Janssen "*consisted of the identical acts proved in the extradition proceedings.*" The fourth clause shows that "*it also appeared in the proceedings preliminary to the warrant of extradition the same act was investigated and the same witnesses examined as at the trial.*"

It appears that in this case the foreign magistrate was of the opinion that the offense was murder, but a different opinion of it was entertained in the court below. The identity of the offense is, however, determined by the constituent facts and circumstances rather than by the name given to it. Several extradition treaties contemplate the surrender of persons seeking an asylum here for trial upon charges for which our jurisdiction has no corresponding designations. For example, our treaty with Mexico names "mutilation" among the crimes for which fugitives are to be mutually surrendered. Our treaties with France, Italy, Sweden and Norway, Hayti, Nicaragua, Venezuela, and other countries, named "murder, comprehending assassination, parricide; infanticide, and poisoning." In either of these cases it would occur that the surrendered person would be put to trial upon a charge calling the offense by a different name from that given to it by the country from which he had been surrendered.

The variety of penal codes in the different States of the Union renders it probable that the designation of offenses would differ according to the locality of the tribunal where the offender should be arraigned. In our judgment, the most extreme claim of treaty obligations or international comity would be met if the identical occurrence for which the fugitive is delivered up be submitted to the tri-

bunals of this country, and no occasion would arise for complaint of bad faith or deception. If the defendant, who was extradited upon the charge of murder, had been put upon trial for that offense, and found guilty of manslaughter, would it be competent for him to claim his discharge upon the ground that he had been tried for an entirely different offense than that for which he had been surrendered? Would he occupy any better position if, upon the same evidence that had caused his surrender upon the charge of murder, the grand jury indicted him for inflicting cruel and unusual punishment? We think not.

The method of ascertaining the identity of offenders and offenses has been much considered under the pleas of *autrefois acquit*, *autrefois convict*, and former jeopardy. The doctrine has been generally recognized that the criterion in such cases is always the answer to the question whether or not the material facts and ingredients in the second case are the same as in the first. In Wharton's Criminal Pleading and Practice, section 480, it is said that the identity of offender and offense must be established. But if the offense for which the defendant was convicted is to be considered an offense other than that for which he was surrendered, still it appears that he was not tried for the offense of which he was convicted until after the grand jury had refused to indict for murder *eo nomine*.

We submit, therefore, that the proceedings in the court below have been regular, and that the conviction of the defendant must be sustained.

Respectfully submitted.

JOHN GOODE,
Solicitor-General.

119407

Supreme Court U. S.
FILED
FEB 24 1886
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

NO. 1249.

THE UNITED STATES

vs.

WILLIAM RAUSCHER.

DEFENDANT'S BRIEF.

A. J. DITTENHOEFER,
Of Counsel.

DAVID GERBER,
Attorney.

Supreme Court of the United States.

THE UNITED STATES
vs.
WILLIAM RAUSCHER.
No. 1249.

DEFENDANT'S BRIEF.

The indictment on which the defendant was convicted was framed under Section 5347 of the U. S. Revised Statutes and charged that, while second mate on board of the American vessel "I. F. Chapman," on waters within the admiralty and maritime jurisdiction of the United States, he, the said William Rauscher, did "unlawfully make an assault, and, from "malice, hatred and revenge and without justification, did "unlawfully inflict upon one Jansen cruel and unusual "punishment" (fols. 1–5).

The defendant having been brought within the jurisdiction of the Circuit Court of the United States for the Southern District of New York by *extradition* from Great Britain on the *charge of murder*, was thereafter and without being tried for that offense, indicted and convicted under Section 5347, as above stated.

On a motion for a new trial, the Court in banc divided upon the question of the jurisdiction of that Court to try the defendant for an offense *different* from that for which he was extradited; and that question is now presented to this Court under said certificate.

POINT I.

The Court below had no jurisdiction to try the defendant for a crime other than the one for which he was extradited from Great Britain.

There is no obligation imposed by the law of nations to surrender a fugitive from justice; and the right of one government to demand from another the extradition of an offender who has sought asylum upon its soil, depending entirely upon the conventional arrangement between the two governments, is measured by, and restricted to the provisions thereof.

Matter of British Prisoners, 1 Woodb. & Minot, 66.
Matter of Metzger, 5 How. (U. S.), 177.
Adriance *vs.* Lagrave, 59 N. Y., 110.
Com. *vs.* Hawes, 13 Bush. (Ky.), 697.
U. S. *vs.* Davis, 2 Sumn., 482.

The uniform opinion of our Government upon the question of extradition is that "the President is not considered as "authorized in the absence of any express provision or treaty "to order the delivery up of fugitives from justice"; and "it "is the established rule of the United States never to grant "nor to ask for the extradition of criminals as between "us and any foreign government, unless in cases for which "stipulation is made by express convention."

Sullivan's Case, 1 Opp. Atty.-Gen., 509.
Huygen's Case, 2 Opp. Atty.-Gen., 452.
DeWitt's Case, 3 Opp. Atty.-Gen., 661.
Wing's Case, 6 Opp. Atty.-Gen., 85.
Martin's Case, 6 Opp. Atty.-Gen., 431.

Though Chancellor Kent in 1819 in the matter of Daniel Washburn (4 John. Ch. Rep., 105), in an opinion which has never been followed either by the New York State Courts (59 N. Y.,110) or by the Federal Tribunals (14 Fed. Rep., 130), held that, by the law of nations, a fugitive fleeing from the country

in which the crime is committed, ought to be surrendered by the country in which he sought asylum; still, even in that case—which was decided in the interval between the expiration of the Jay Treaty and signing the Ashburton Treaty—the Chancellor admitted that, if a stipulation did exist between the two governments, the rule of "*expressio unius, est exclusio alterius*" applied. It can, therefore, be safely stated that there is no authority or judicial opinion authorizing or justifying one country, having an extradition treaty with another, to surrender a fugitive for an offense not enumerated in the treaty. Indeed, the necessity for a treaty to justify the surrender of an offender was recognized long prior to the adoption of our Constitution. During the Colonial period, a compact for extraditing fugitives existed, and such a provision was incorporated in the fourth section of the Articles of Confederation. In the first treaty with Great Britain, known as the Jay Treaty, in 1794, it was provided that all persons who, being "charged with *murder or forgery* committed within the jur- "isdiction of either country and who should seek an asylum "within any of the countries of the other, should be delivered "up to justice." Under that treaty, which expired by its own limitation in 1806, but one case arose, that of Robbins *alias* Nash, in 1795, extradited for murder on board a British vessel (Wharton's State Trials, 392).

The treaty now in force, known as the Ashburton Treaty, was made in 1842, and in its 10th Article provides as follows:

> "It is agreed that the United States and her Britannic "Majesty shall, upon mutual requisitions by them "* * * * deliver up to justice all persons who, being "charged with the crime of murder or assault with intent "to commit murder, or piracy, or arson, or robbery, or "forgery, or the utterance of forged paper, committed "within the jurisdiction of either, shall seek an asylum "or shall be found within the territories of the other; "provided that this shall only be done upon such evidence "of criminality as, according to the laws of the place "where the fugitive or person so charged shall be found,

"would justify his apprehension and commitment for "trial, if the crime or offense had there been committed; "and the respective judges and other magistrates of the "two governments shall have power, jurisdiction and "authority upon complaint made under oath, to issue a "warrant for the apprehension of the fugitive or person "so charged, that he may be brought before such judges "or other magistrates respectively, to the end that the "evidence of criminality may be heard and considered; "and if, on such hearing, the evidence be deemed sufficient "to sustain the charge, it shall be the duty of the exam- "ining judge or magistrate to certify the same to the "proper executive authority that a warrant may issue for "the surrender of such fugitive." * * * * *

Though it was held by the Attorney-General in the Cochrane case (4 Opp. Atty-Gen., 201) that this treaty was self-executing, and by Judge McLean in the Metzger case (5 How., 176) that the treaty of 1843 with France was also self-executing, without legislation, Congress in 1848 (9 U. S. Statutes at Large, 301) passed an act "to give effect to certain treaty "stipulations between this and foreign governments for the "apprehending and delivering up of certain offenders." This law, after providing for the apprehension and commitment of fugitive criminals, provided in the third section that "it shall "be lawful for the Secretary of State, under his hand and "seal, to order the person so committed to be delivered to "such person or persons as shall be authorized in the name "and on behalf of such foreign government *to be tried for the "crime of which such person shall be so accused*, and such "person shall be delivered up accordingly." This act was to continue only during the existence of any treaty of extradition with any foreign government and no longer.

Sections 5270, 5277, U. S. Rev. Stat.

On the third of March, 1869, a further act was passed by Congress providing that "whenever any person who shall be deliv- "ered up by any foreign government to an agent or agents of "the United States for the purpose of being brought within

"the United States and tried for any crime of which he is "duly accused, the President shall have power to take all "necessary measures for his security against lawless violence "until the final conclusion of his trial *for the crimes or of-* "*fenses specified in the warrant of extradition;* and until "his final discharge from custody for or on account of *such* "*crimes or offenses* and for a reasonable time thereafter."

15 U. S. Stat. at Large, p. 337.

And the English Parliament, by laws passed in 1843, made similar provision for carrying into effect the Ashburton Treaty; and in 1870 passed an act which, repealing the former acts inconsistent therewith, provided, among other things that "a fugitive criminal shall not be surrendered to a "foreign State unless provision is made by the law of that "State or by arrangement that the fugitive criminal shall not, "until he has been restored or had an opportunity of return- "ing to Her Majesty's Dominions, be detained or tried in that "foreign State for any offense committed prior to his sur- "render, other than the extradition crime proved by the facts "on which the surrender is grounded."

33 and 34 Victoria, p. 52.

The ablest international jurists and text writers, as well as the more recent decisions construing the Ashburton Treaty and the legislation in connection therewith, maintain that the fugitive criminal is entitled to absolute immunity in the country to which he has been extradited for any crime previously committed other than that for which he was surrendered. It is held that the treaty operates to withdraw the right of asylum which the fugitive secured in the country from which he was extradited *only* for the cases enumerated therein. But as regards any other crime committed prior to the extradition, the offender is to be regarded as within the exclusive jurisdiction and under the protection of the country that surrendered him.

The purpose of extradition treaties being to withdraw the right of asylum from certain specific offenders only, if

they can be tried after extradition for any offense, the recital in the treaty of the offenses for which extradition is allowed would be meaningless.

While no country will permit the right of asylum for religious or political offenders to be invaded on any pretense, this object could be readily accomplished if the government to whom the criminal has been surrendered be not restricted to punishing him for the offense for which he was delivered up; and it is submitted with respect that no treaty should be construed so as to permit such a dangerous practice.

Again, when a person is placed upon trial for a different offense from that for which he was surrendered, he is deprived of every right to which he is entitled under the treaty, such as demand for his surrender, upon the government of the country of his asylum; the furnishing of evidence of his criminality in that country; a complaint under oath and an adjudication that the evidence is sufficient to sustain the charge in that country. In fact, as in the case at bar, the jurisdiction acquired under the treaty may proceed and terminate in flagrant disregard thereof, even to the punishment of the person extradited for a non-extraditable offense. If this be authorized under our judicial system, an extradition treaty would, in the language of the Texas Court of Appeals, "be but a snare, a delusion, a farce and a solemn fraud" (Bladford *vs.* State, 10 Texas Ct. App., 635).

But it is said that this, being a matter for the intervention of the political and not of the judicial department of the government, the Court is not called upon to inquire into the methods by which the prisoner was secured. It is, to say the least, a glaring inconsistency that, in a civil action, involving but a few dollars, the Court will release a defendant from arrest who has been brought within its jurisdiction by fraud, while in a criminal prosecution, involving life and liberty, it has no jurisdiction to inquire into the manner in which the presence of the defendant was secured. If it be true that the political department only can interfere to prevent the trial of an extradited person for an offense other than that for which he was extradited, there would be no power in the Federal Govern-

ment to prevent a violation of a treaty by a State tribunal, as the President having no power to control or restrain the prosecution by a State Court of an extradited fugitive brought within its jurisdiction, he might be tried by a State tribunal for a political offense in spite of the President's prohibition, as in the case of McLeod (1 Hill, N. Y., 378).

But it is not simply a question of good faith between the two contracting governments. It affects the personal rights of the accused, of which he *alone* can complain, and which, under the law of the land, the Courts are bound to respect. By the Federal Constitution a treaty is the supreme law of the land, to be obeyed by every Court, State and Federal. In United States *vs.* McLean (2 Peters, 253), Chief Justice Marshall says: "Our Constitution declares a treaty to be the law of "the land. It is consequently to be regarded in Courts of "justice as equivalent to an act of the legislature whenever it "operates of itself without the aid of any legislative pro- "visions." When, therefore, the provisions of a treaty are disregarded, it is an infraction of the law of the land, of which the prisoner properly can complain. It is, therefore, by no means an answer to the prisoner's plea to the jurisdiction of the Court to say that proceedings in violation of the treaty, by which his person was secured, involved simply a breach of good faith to be taken notice of only by the government; it is both a public wrong, to be noticed by the government, and a private wrong to the accused to be redressed by the Courts. If Congress had passed a law that no Court should have jurisdiction of a prisoner extradited from a foreign country excepting to try and punish him for the offense for which he was extradited, a plea to the jurisdiction of the Court would unquestionably be sustained. Now, a treaty is as much the law of the land as an Act of Congress, the accused has the same right to avail himself of its provisions, and it is as binding upon the Court as if it had been reënacted by Congress in the form of a statute. Congress cannot increase or diminish the rights secured by the treaty; it can only pass measures to carry it into effect. It will be noticed that the acts passed show the appreciation by Congress that the right

of asylum of a fugitive for all offenses other than the extradition crimes, is inviolable. The Act of 1848 limits the commitment and delivery of persons for the purpose of being "tried for the crime of which such person shall be so accused." And the Act of 1869 aims to secure the accused against all lawless violence "*until the final conclusion of the trial for* "*the crime or offenses specified in the warrant of extradi-* "*tion.*"

The few authorities adverse to this view all rest on a *nisi prius* decision of Judge Benedict on a demurrer to a plea to the jurisdiction of his Court in the case of Caldwell (8 Blatch., 131). And it is a noteworthy circumstance in connection with that decision that the District Attorney who represented the Government in that case, Judge Noah Davis, changed his view after he had been elevated to the bench (Bacharach *vs.* Lagrave, 1 Hun, N. Y., 689). Judge Benedict, in a very brief opinion, held in that case that "while abuse of extradition "proceedings and want of good faith in resorting to them "doubtless constitute good cause of complaint between the "two governments, such complaints do not form proper sub-"ject of investigation in the Courts, *however much tribunals* "*might regret that they should have been permitted to arise.*" It will be seen that, while the learned judge deeply regretted the violation of the treaty, he held that he was powerless in the premises. But in coming to that conclusion he overlooked the fact that the prisoner's plea raised the question of the violation of his right as secured to him by the supreme law of the land; and his refusal to sustain the plea amounted to a repudiation of that law which every Court is bound to respect and to which every accused has a right to appeal.

The case of the United States *vs.* Lawrence (13 Blatch., 295) was likewise decided by Judge Benedict. It is significant that an extensive and spirited diplomatic correspondence between the Hon. Hamilton Fish, representing the United States, and Lord Derby, representing Great Britain, referred to later on, resulted in the District Attorney receiving instructions from the Attorney-General to the effect that "for

"grave political reasons Lawrence should be tried for the "charge on which he was extradited, and upon no other."

Letter of Mr. William Beach Lawrence, 14 Alb. L. J., 85–91.

It may be well briefly to refer to the opinion of the learned Judge in that case. He argues that the treaty directing that "an offender shall be delivered up to justice" imports a delivery for the purpose of "public justice without qualification." But the treaty directs that the government shall "deliver up to justice" only persons charged with the crimes therein mentioned. It would be a meaningless use of words to enumerate in the treaty the offenses of which a person must be accused to justify a surrender, if that surrender was intended to be "without qualification." And it would be a needless waste of time to require "evidence of criminality of the specified offense," if, after surrender, that offense can be disregarded and the person can be tried for a non-extraditable crime. The learned Judge then follows with a statement that the Act of 1848 providing for the delivery of a prisoner "to be tried for the crime of which such person shall be so accused" does not limit the operation of the provisions of the treaty, and that if there had been an intention to limit the provisions, such intention would have been plainly expressed. In this, we respectfully submit, the learned Judge erred, as the act provides for the surrender of a fugitive *only* after evidence of his criminality has been adduced and the offender is to be tried only for the crime "of which such person shall be so accused." This language clearly conveys the intent that a surrender would be authorized only for the *limited purpose* of trying the fugitive for the crime for which he was surrendered.

In referring to the Act of 1869, the learned Judge states that, while it is true that it assumes that offenders will be tried for the offense for which surrender was obtained, there are no words indicating that he must be protected from trial for any other offense, and he holds that this consideration is sufficient to deprive the act of the force claimed for it by the prisoner. An apt reply to this view is found in the criticism by Mr.

William Beach Lawrence of Adriance *vs.* Lagrave, that "The "Act of 1869 for the protection of a prisoner extradited under "the treaty, I consider, despite the opinion of the Court of "Appeals, sufficient to meet the case of a trial for an offense "for which the prisoner was not surrendered."

Letter of Lawrence on Extradition, 16 Alb. L. J., 364.

Several English cases are cited by Judge Benedict to sustain his views, which will be briefly referred to.

The case of Heilbronn, decided in 1854, did not present the question under discussion. Heilbronn, extradited for forgery, was tried for larceny; but it was a private prosecution over which the government had no control and took no part and in which the *question of the right to try the defendant for larceny was not raised or passed upon.* Lord Derby, in replying to a letter of Secretary Fish in 1876, referring to the Heilbronn case, taking this view, says:

"Her Majesty's Government must repeat that this de- "parture from the extradition warrant in the case of "Heilbronn was not the act of Her Majesty's Govern- "ment, nor was it called to their attention or known to "them; and Her Majesty's Government was not aware "of any other instance which has occurred in this coun- "try, during the long period that has elapsed since 1842, "where a person surrendered under the treaty of 1842 has "been put upon trial for an offense other than that in re- "spect to which his extradition was demanded."

Foreign Relations of the United States 1876, p. 259.

See Letter of Lawrence on Extradition, 14 Albany Law Journal, 91.

And when Judge Benedict in the Caldwell case referred to the Heilbronn case, he expressed the same opinion, saying that, "whether the question was taken upon the trial in Great "Britain he does not know, and he *does not therefore refer*

'*to the case as an authority*, but merely notices it as, per-
" haps, a precedent."

The case of Burley, referred to by Judge Benedict, was the subject of diplomatic correspondence, and *not* of *judicial determination*. Burley was charged by the United States with having committed robbery on board the steamer "Philo Parsons" on Lake Erie. He claimed protection as having been in the service of the Confederate States. At his trial the jury disagreed, and, being released on bail, he forfeited his bond.

Clark on Extradition, 2d ed., 90.

The fear that Burley might be tried for piracy induced the British Government, through its representative at Washington, to notify the Secretary of State that "Her Majesty's " Government * * * * are of the opinion that if the " United States Government, having obtained the extradition " on the charge of robbery, do not put him on his trial upon " this charge, but upon another, namely piracy (which if it " had been made before the Canadian authorities they might " have held not sufficiently established to warrant his extra-" dition) this would be a breach of good faith against which " Her Majesty's Government might justly remonstrate."

To which our Secretary replied, that he is not "prepared to " admit the principle claimed in the protest of Her Majesty's " Government. Nevertheless, the question raised upon it " *has become an abstraction, as it is at present the purpose* " *of the Government to bring him to trial for crimes against* " *municipal law only.*"

See Foreign Relations of the United States 1876, pp. 280-292.

Judge Benedict, in referring in his opinion in the Lawrence case to the British Extradition Act of 1870, cited the case of Bouvier (27 L. T. Rep., 844), as showing that the English Courts incline to the opinion that that act would have no effect in England to limit the extradition treaty of 1842. In that case the extradition of Bouvier was demanded by the French

Government, and it being claimed that the French authorities might try the accused for an offense other than that for which surrender was demanded, proof was presented by the affidavit of M. Adolphe Moreau "that it is a principle of French and "International law that an individual whose extradition has "been granted can only be prosecuted and tried for the very "crime for which his extradition has been obtained." And on that statement the prisoner was remanded. Mr. Spear, in his treatise on the law of extradition, in criticising this portion of Judge Benedict's opinion, says: "The Judge was very "unfortunate in the case which he cited, as well as in the "words which he quoted." And in numerous other instances has this opinion been criticised.

The State *vs.* Hawes (4 Am. Times Rep., 524).
U. S. Watts, 14 Federal Reporter, 139.
See Letter of Lawrence, 16 Albany Law Journal, 361.

The next case requiring notice is Adriance *vs.* Lagrave (59 N. Y., 110). This was a civil action in which the defendant, after having been extradited on a criminal charge, was arrested in a common law proceeding by a party *who had no connection with the extradition proceedings.* The civil arrest procured by the creditors interested in the extradition was vacated by the Court upon the ground, that the jurisdiction obtained over the person of the defendant, after he had been surrendered under the extradition treaty, could not be retained so as to permit an arrest in other proceedings.

14 Abb. Pr. Rep. N. S. (N. Y.). 333.

Thereafter, two creditors who had taken no part in the extradition proceedings instituted a civil action in which an order of arrest was issued. The Special Term of the New York Supreme Court, Lawrence Justice, presiding, refused to vacate the arrest, on the ground that the plaintiff in that action was not in any way a party to the extradition of the defendant. But the General Term, Davis, P. J., Daniels and Brady, J. J.,

overruled the Special Term, holding in a very clear and able opinion that:

"When the defendant was extradited it was for the "purpose of answering the crime mentioned in the pro- "ceedings taken against him, and for no other purpose "whatsoever. As to all other matters, being beyond the "reach of the laws of this State, he was absolutely entitled "to his freedom. * * * * He was entitled to the "protection of those laws so far as his personal liberty "would have been secured by them in case no removal of "of his person had been made; * * * * it was implied "in his surrender that he should be at liberty to return "again to France when the purpose of justice had been "performed in the charge made against him. * * * *

"It it true that this provision (Act of 1869) does not, in "terms, include the present case, for it only extends "to acts of lawless violence, but it is cogent evidence of "the spirit of the obligation resting upon the public "authorities to restrict the restraint imposed simply to "the crime charged and mentioned in the treaty. The "obligation is no greater to protect the party from lawless "violence than it is to protect him from all other deten- "tion of his person. After the purposes of justice are "satisfied as to the particular offense for which the party "may be surrendered, then his right to return again to "the protection of the laws he was deprived of for the "single object allowed by the treaty, is clear and abso- "lute. A different construction would involve conse- "sequences which no State having authority to protect "its citizens or subjects would be willing to submit to; "for it would allow embarrassments and hardships that "it could not be contemplated the authorities receiving "them should be at a liberty to inflict upon them. * * * "Any different construction would be entirely unreason- "able, and no enlightened nation would be willing to "submit to it. * * * *"

1 Hun, N. Y. Supreme Court Rep., 689.

The Court of Appeals in this case, however, by a divided Court, on the authority of the Caldwell case, reversed the General Term and affirmed the Special Term. While in its opinion the decision of the General Term was conceded to be "eminently just," and "the justness and fairness in the abstract of the principle was appreciated;". it was held "that it was not for the courts to interfere" but that "the right of "exemption from prosecution, if it can be said to exist at "all, is based on the good faith of the government, which is "necessarily uncertain and is a political and not a judicial "question." Chief-Justice Church, of the Court of Appeals, arrived at this conclusion after citing the Burley case and a French authority showing, as he states, "that the tribunal "had nothing to do but to try the facts and that it could not "take cognizance of the conditions upon which extradition "had been granted, except upon a notification from the Min-"ister of Justice." In giving this decision, the learned Justice overlooked the difference between the English and French systems of government and our own. With those governments a treaty is but a governmental contract with which the judiciary can have no concern and which can only be carried into execution by the sovereign power of the state; whereas, under our form of government, a treaty is the supreme law of the land and necessarily a matter of judicial cognizance. And yet in England, the practice has been, as has already been shown, not to permit a trial for an offense other than that for which the accused was surrendered (Diplomatic Corr. Foreign Rel. U. S., p. 228), and in France, no person who has been extradited is placed on trial for an offense other than that for which he was surrendered.

Affidavit of M. Adolphe Moreau, *ex parte* Bouvier, 27 L. T. Rep., 844.

Circular French Minister of Justice, issued April 15th, 1841.

Mr. Chief-Justice Church also adduces from the English Extradition Act of 1870, the argument that "this provision would have been unnecessary if there existed any such treaty obligation as claimed in the case." But such was never

the understanding of the English Government, for Lord Derby says: "He would have taken the same position if no act had been passed." (Foreign Rel. U. S., 1876, p. 279.) And in his letter to Col. Hoffman, June 30th, 1876, he says:

> "The act of Parliament in question imposed no condition new in substance upon the treaty of 1842, inasmuch as the true meaning of that treaty is that a person accused of a specific crime or specific crimes, shall be delivered up to be tried for the crime or crimes of which he is accused, and that an agreement between the two powers that a right of asylum equally valued by both, shall be withdrawn only in respect to certain specific offenses, implies as plainly as if it were expressed in its words that in respect of the offense or offenses laid to his charge and such offense or offenses only is the right of asylum withdrawn." (Messages and Doc. Dep't. of State, 76–77.)

The reason for the passage of the Act of 1870 was not, as stated by Chief Justice Church, to provide for an omission in the treaty, but was, as stated by Lord Derby in the Winslow correspondence:

> "To prevent for the future evils that were pointed out by Mr. Hammond and others as having occurred and being liable to occur in private prosecutions, to which the attention of the Government had not been called. Her Majesty's Government consider the provisions of the act as having been devised not in the particular interest or for the particular ends of Great Britain, but as the embodiment of what was the general opinion of all countries on the subject of extradition, and as being beneficial to all and injurious to none. That the general opinion of European nations has justified this view, is proved by the acceptance by most of the leading nations of Europe of extradition treaties based on its provisions." (Foreign Rel. of N. Y., 1876.)

We have, therefore, in the Lagrave case, which is largely based on Judge Benedict's decision, the opinions of Judges Folger and Grover, of the Court of Appeals, and of Judges Davis, Brady and Daniels, of the Supreme Court, weighed against those of Chief Justice Church and Judges Allen, Rappallo, Andrews and Miller, the latter conceding the doctrine stated by the former to be just and fair in the abstract.

It may be mentioned in passing that the question under discussion has no reference to inter-state extradition, for the reason that, under the Constitution, the surrender of a criminal by one State of the Union to another is not limited to any particular class of offenses, but may be had for any and every crime.

U. S. *v.* Watts, 14 Fed. Rep., 130.

With the exception of these decisions, the position we contend for is sustained by the weight of authority. The international writers and publicists who have made a study of the subject, are unanimous in the opinion that the right of asylum of the extradited criminal is withdrawn only for the limited purpose mentioned in the warrant of extradition.

Wharton, in his work on Criminal Law (7th Ed., Vol. 3, p. 4), says:

> "The process is not to be used for the purpose of subjecting him (the fugitive) collaterally to criminal prosecutions other than that specified in the demand. * * * It is an abuse of this high process and an infringement of those rights of asylum which the law of nations rightly sanctions to permit the charge of an offense for which extradition lies to be used to cover an offense for which extradition does not lie, or which it is not considered politic to involve."

Hon. William Beach Lawrence, the international jurist, states that—

> "When the treaty prescribes the offenses for which extradition can be made and the particular testimony

"to be required, the sufficiency of which must be certi-
"fied to the executive authority of the extraditing
"country, the State receiving the fugitive has no juris-
"diction whatever over the matter, except for the
"specific crime to which the testimony applies." (14 Alb. Law Journal, 96.)

Field's International Code, Section 237.
10 Albany Law Review, 617.
Spear on Extradition, 2d Ed., 93.
Gibbs' Pamphlet on Extradition, published in London (1868).
Marten's Précés (Ed. 1864), Section 101.
Wharton's Criminal Pleadings and Practice, Sections 49–57.
Wharton's Conflict of Laws, Sections 835–844–846.

The principle enunciated by these eminent *jurisconsults* is sustained by the most recent State authorities. In the State *vs.* Hawes (4 American Times Rep., 425), the defendant was extradited from Canada on charges of forgery, and after his acquittal it was sought to place him on trial for embezzlement. Judge Jackson, in granting a discharge, said:

"If there be a treaty governing the subject, that
"treaty * * is now to control. This Court is bound to
"regard that treaty * * as the supreme law of the land * *
"By the terms of the article of the treaty now under con-
"sideration, it is only for certain offences that extradition
"will be permitted by either government * * It is urged
"in argument that there is no positive stipulation against
"the trial of a non-extraditable offense. Why mention
"any offenses, if a party can be tried for any and
"everything not mentioned? When nations enumerate,
"do they not exclude everything not enumerated? * * If
"there be anything in the doctrine, that when you enum-
"erate rights or privileges, you are held to strictness as
"to the rights enumerated, and that everything not enum-
"erated is not included, then it follows as a logical

"sequence that the treaty having provided only for extra-
"dition as to certain cases, and under certain circum-
"stances and proof, the right of asylum is to be held
"sacred as to anything for which the party was not and
"could not be extradited."

On appeal to the Court of Appeals this decision was affirmed (13 Bush, 697), in a very extensive and learned opinion, wherein the Court says:

"With us a public treaty is not merely a compact or
"bargain to be carried out by the executive and legis-
"lative departments of the General Government, but a
"*living* law operating upon and binding the judicial
"tribunals, State and Federal, and these tribunals are
"under the same obligation to notice and give it effect as
"they are to notice and enforce the Constitution and laws
"of Congress made in pursuance thereof * * When it is
"provided by treaty that certain acts shall not be done,
"or that certain limits or restrictions shall not be dis-
"regarded or exceeded by the contracting parties, the
"compact does not need to be supplemented by legis-
"lative or executive action to authorize the courts of
"justice to decline to override these limitations, or to
"exceed the prescribed restrictions, for the palpable and
"all-sufficient reason that to do so would be not only to
"violate the public faith, but to transgress the supreme
"law of the land * * *

"By the enumeration of seven well-defined crimes for
"which extradition may be had, the parties plainly ex-
"cluded the idea that demand might be made, as matter
"of right, for the surrender of a fugitive charged with an
"offense not named in the enumeration, no matter how
"revolting or wicked it may be * * *

"By providing terms and conditions upon which a
"warrant for the arrest of the alleged fugitive may be
"issued, and confining the duty of making the surrender
"to cases in which the evidence of criminality is suf-

"ficient, according to the laws of the place where such "fugitive is found, to justify his commitment for trial, "the right of the demanding government to decide finally "as to the propriety of the demand, and as to the evi- "dences of guilt, is as plainly excluded as if that right "had been denied by express language * * If this indirect "mode of securing the surrender of persons guilty of "other than extraditable offenses may be resorted to, or "if the demand, when made in the utmost good faith, to "secure the extradition of a criminal within the provi- "sions of the treaty, can be made available to bring him "to justice for an offense for which he could not have "been surrendered, then we do not very well see how "either government could complain if a lawfully extra- "dited fugitive should be tried and convicted of a "political offense. Prosecutions for the crime of treason "are no more provided against by the treaty than prose- "cutions for the crime of embezzlement, or the offense of "bribing a public officer."

Replying to the argument advanced in the Caldwell and Lagrave cases, that it was a matter of good faith only between the governments, the Court say :

"The legal right of a judicial tribunal to exercise juris- "diction in a given case must, from the nature of things, "be open to question at some stage of the proceedings, "and we find it difficult to conceive of a person charged "with crime being so situated as not to be permitted to "challenge the power of the Court assuming the right to "try and punish him. * * * * The treaty under "which the alleged immunity was asserted, being part of "the supreme law, the Court had the power and it was "its duty, if the claim was well founded, to secure to him "its full benefit."

In the State *vs.* Vanderpoel, 39 Ohio St. Rep., 279, in which the defendant, after having been extradited under the Ash-

burton treaty and convicted for an extraditable offense, was sought to be placed on trial upon another charge, the Supreme Court sustaining the plea to the jurisdiction of the Court, say:

"The treaty is the law of the land, and the judges of "every State are as much bound thereby as they are by "the constitution and laws of the Federal or State "Governments. It is therefore the imperative duty of "the judicial tribunals * * to take cognizance of the "rights of persons arising under the treaty to the same "extent as if they arose under the statute of the State "itself. * * * *

"If it be true that the abuse of extradition proceedings "under the treaty is an offense for which the surrender "ing government alone can complain, the remedy is "totally inadequate and the treaty itself may be rendered "nugatory. When the surrender is to one of the States "of the United States the prisoner passes beyond the con- "trol of the Federal Government and into that of the "State. Upon complaint made by the British Govern- "ment to the Federal Government of an abuse by the "State of Ohio of the process under the treaty, the "Federal Government could only answer as it has done "in many instances heretofore, that under our system of "State and Federal Government, the latter is powerless "to control the State authorities. * * * * If it is a "question not cognizable in the Courts, it is of little value "under our system of Federal and State Governments." * * *

These adjudications by State tribunals are fully concurred in by Federal Courts. In the United States *vs.* Watts, 14 Federal Reporter, 139 (1882), the prisoner entered a plea to the jurisdiction of the Court that the offense with which he was charged in the indictment was not enumerated in the treaty between the United States and Great Britain. Judge Hoffman, sustaining the plea, held that:

"It has long been the established rule neither to grant "nor to ask for extradition of criminals as between us

"and any foreign governments, unless in cases for which "stipulations have been made by express convention. * "* * * *It is the duty imposed on the Courts to re-* "spect and obey the stipulations of a treaty as the "supreme law of the land;* they are also charged with "the duty of determining its meaning and effect, and this "duty they must conscientiously and firmly perform, "*even though the construction they feel compelled to* "*give to it should differ from that given to it by the* "*political branch of the government.* * * * *

"It (the treaty) enumerates seven crimes for which the "surrender of the fugitive may be demanded. It will "not be disputed that this enumeration is exclusive and "that the fugitive can be demanded for the enumerated "crimes and none others. No clearer case for the appli-"cation of the familiar rule, *expressio unius, est exclusio* "*alterius*, can easily be imagined. * * * * To what "end is this careful and exclusive enumeration of offenses "if, after surrender for any one of them, the person may "be tried for other offenses not included in the enumera-"tion. * * * *.

"The legislation of both Great Britain and the United "States appears to have given a practical construction to "the treaty in accordance with the view I am attempting "to maintain. * * * *

"The case of Caldwell upon the authority of which the "subsequent case of Lawrence was decided, appears to have "been treated as a question not of jurisdiction but of privi-"lege from arrest. The provisions of the treaty * * * "do not appear to have been considered, nor is any ref-"erence made to the rules of international law, the opin-"ions of foreign jurists or the practices of civilized "nations. The opinion seems to proceed on the erro-"neous supposition that Great Britain had definitely "acquiesced in the construction contended for; and the "case of Heilbronn so fully explained in subsequent dis-"cussions is stated as a precedent, if not an authority. "The decision, it may be added, was rendered in 1871,

"five years before the case of Winslow arose. With the "greatest respect for the eminent Judge who decided "this case, I am compelled to dissent from his conclu- "sions. * * * *

"It remains to be determined whether the immunity "from prosecution for crimes other than that for which "the fugitive has been surrendered can be enforced by "the Court or only by the intervention of the political "branch of the Government. * * * The treaty is the "supreme law of the land and as binding on the Courts "as a statutory enactment. If it contained an express "prohibition, the Court would, beyond doubt, be de- "prived of jurisdiction. If by a just and reasonable "interpretation the prohibition must be applied, the same "result follows. It may be added that assuming that "the receiving power has no right to try the fugitive ex- "cept for the offense for which he has been surrendered, "the immunity so guaranteed is a *right of the prisoner* "and can be far more surely and conveniently asserted "before the Courts than by diplomatic intervention."

In *ex parte* Kerr, 18 Federal Reporter, 167, which was an application for writ of *habeas corpus* to release the accused, it appeared that, being charged with larceny and forgery, he fled to Peru, whereupon proceedings were instituted to extradite him. For some cause the extradition proceedings miscarried, notwithstanding which the petitioner was seized without authority, and against his consent brought into the jurisdiction of the Court. Judge Drummond, in denying the application for the writ, maintained the contention claimed for by us, but held, that as the petitioner was not brought to the United States pursuant to treaty stipulations, there was no question presented of violation of rights secured by the treaty, but was a matter of private injury between him and the person who did the kidnapping; and he intimated that had the question arisen under the treaty the prisoner would have been entitled to his discharge, the Judge saying:

"The only cases which have been cited which seem to "have some bearing upon the question involved here are

"those which have arisen where parties have been trans-
"ferred from a foreign country to the United States and
"treaties have existed under which the extradition was
"made from a foreign country to the United States for
"the commission of a particular offense. Some have held,
"and such seems to be the opinion of Mr. Spear, who has
"written a work on the law of extradition, that where a
"party has been arrested under the authority of a treaty
"in a foreign country and transferred to this country for
"the commission of an offense here, he cannot be tried
"for a different offense. Perhaps it may be said the
"*weight of authority* is in accordance *with that view.*
"* * * Here the petitioner had not been taken under the
"authority of law and in pursuance of the terms of a
"treaty between the United States and a foreign country
"from that country to this."

Blanford *vs.* State, 10 Texas Ct. of Ap., 627.
In re Cannon, 47 Michigan, 481.
Compton *vs.* Wilder, 40 Ohio St. Rep., 130.
19 Albany Law Journal, 329.
North American Review, 497.

It may be argued that the crime of which the defendant was convicted arose out of and was connected with the acts constituting the crime for which he was extradited. Assuming that to be so, the question still remains the same. The right of asylum acquired by the defendant in Great Britain was sacred and inviolable subject only to the provisions of the treaty of extradition. Had our government demanded the defendant for the purpose of trying him for the crime of having inflicted cruel and unusual punishment upon Jansen, his right of asylum would have protected him under the treaty and would have prevented his being extradited. The formality of charging an extradition offense, without the intention of trying him therefor, gives this government no greater rights or the prisoner any less protection under the treaty than if the demand had been made for the non-extradition offense of assault of which he was convicted.

In the case of Frank Cannon (47 Mich., 485) the defendant was extradited from Kansas on demand of the State of Michigan to be tried for seduction, but he was placed on trial for bastardy, an offence which, as in this case, arose out of the same facts for which his surrender was granted. The defendant claimed *that bastardy* was not a *crime* within the law of Michigan; and the Court sustaining his plea to the jurisdiction, said: "The State of Michigan has no legal power to demand and the State of Kansas has no legal power to deliver up any persons but those charged as fugitive criminals. The constitutional safeguards on this subject concern the individual's liberty and not merely the State's dignity and no one holds his liberty subject to State comity, or by any less tenure than constitutional right."

It is the clear language and plain intent of the Ashburton Treaty that only criminals who have committed *one of the seven grave offenses therein enumerated* and have fled the country *should be surrendered for trial and punishment for such crimes and for none other.* If the defendant's crime was not murder under our laws, but simply an assault, then the right of asylum secured by him in England was inviolable; and the treaty being the supreme law of the land, our Courts were bound to protect him in that right.

Sir Edward Thornton, replying in September, 1870, to a letter of Secretary Fish, in which Mr. Fish inquired whether "if during the trial of a person whose extradition had been "asked for on a crime such as larceny, evidence unknown "should appear that the prisoner had been guilty of a higher "crime, such as murder, it would be legal to try him for the "latter crime," says:

> "That any provision in a treaty by which the fugitive "surrendered for one offense mentioned * * * may be tried "for another, committed prior to his extradition, other "than the extradition crime for which he was surrendered, "would be inadmissible."
>
> Foreign Relations of the United States, 1876, page, 228.

The delivery of this defendant by England to this country "charged with the crime of murder," was for the purpose of trying him for that offense and not for a lesser or different crime.

A different construction might frustrate the very purpose of the treaty. A political offender seeking an asylum in this country might be demanded on a charge of murder, and proof offered of facts which, according to the laws of this country, would constitute homicide, and after his surrender be placed upon trial for treason, as the offense may have been committed at a time, upon a person, or under circumstances which, according to the laws of the demanding country, would be treason.

There is no middle course; either the surrender of the defendant was for an unlimited purpose and he could be tried for any offense, as held by Judge Benedict in the Caldwell and Lawrence cases, or it was for the purpose of trying him for the crime specified in the warrant of extradition only, in which case his trial and conviction for a different crime was without jurisdiction.

POINT II.

It is respectfully submitted that the first interrogatory of the Court below should be answered in the negative; and the second, third and fourth inquiries in the affirmative.

A. J. DITTENHOEFER,
Of Counsel for Defendant.

DAVID GERBER,
Attorney.

119-407

THE

Supreme Court

OF THE UNITED STATES.

THE UNITED STATES

against

WILLIAM RAUSCHER.

No 1249

SIR: Take notice that on the annexed statement of the matter involved, with reasons for the application, I shall move this Court, on the 18 day of January, 1886, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, to advance the above-entitled case for an early hearing.

Dated January 18, 1886.

Yours, &c.,

A. J. DITTENHOEFER,

Of Counsel for Defendant.

To the Honorable ATTORNEY-GENERAL.

THE SUPREME COURT

OF THE UNITED STATES.

THE UNITED STATES
against
WILLIAM RAUSCHER.

Criminal prosecution under Section 5347 of the Revised Statutes; certificate of division from the Second Circuit, Southern District of New York.

Motion to advance case under Rule 26.

This case is before the Court on a certificate of division of opinion by the Circuit Court of the United States for the Southern District of New York, on questions as to whether the defendant, extradited from Great Britain, on the charge of murder, can be tried for violating Section 5347 of the Revised Statutes in having beat and wounded a sailor on board of an American vessel, and certain alleged errors in the rulings, and instructions of the trial Judge as to the right of the Government to try the defendant, for the offence charged, which said questions have been certified to this Court, and filed, and to the same reference is hereby made.

I.

The defendant makes this application on the ground that this is a criminal prosecution, and is believed to be the first case in which the questions

involved were presented to this Court for review. The defendant is now, and since December 18th, 1884, has been, in actual custody and imprisonment. On said December 18th, 1884, he was arrested in England, and brought to this country on a warrant of extradition on the 5th day of February, 1885. He deems himself entitled (as held by the Circuit Judge) to his discharge and liberty.

Dated January 18, 1886.

A. J. DITTENHOEFER,
Of Counsel for Defendant.